Supreme Court, U.S.
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No.

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In the
Supreme Court of the United States

October term 1995

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Richard L. Frazier, Petitioner

vs.

James B. King,
Director of the Office of Personnel Management

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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# PETITION FOR WRIT OF CERTIORARI

Richard L. Frazier, *pro se*
337 Prospect Street
East Hartford, Conn. 06108

65pp

## QUESTION PRESENTED FOR REVIEW

In a federal employment labor relations arbitration arising from a collective bargaining agreement, wherein the parties have submitted the question of whether the grievant's suspension was for just cause, and the arbitrator determines that the grievant sexually harassed co-employees but that nonetheless the suspension was without just cause because of the employer's tolerance of the grievant's misconduct, did the Court of Appeals improperly exercise review to determine whether the arbitrator had applied the correct standard of law to determine whether the grievant had sexually harassed co-employees?

## PARTIES TO THIS PROCEEDING

The case caption lists all parties.

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## TABLE OF CITATIONS

1. James B. King v. Richard L. Frazier, No. 94-3670, December 19, 1995, United States Court of Appeals for the Federal Circuit (Judgment).

2. James B. King v. Richard L. Frazier, No. 94-3670, September 28, 1994, United States Court of Appeals for the Federal Circuit (Order granting rehearing, miscellaneous docket number 389).

3. James B. King v. Richard L. Frazier, No. 94-3670, February 24, 1994, United States Court of Appeals for the Federal Circuit (Order denying petition for review, miscellaneous docket 389).

4. In the matter of United States Department of Housing and Urban Development and Richard L. Frazier, Grievant, October 19, 1993, Federal Mediation and Conciliation Service, Arbitration No. 92-05883, Report On Reconsideration Of Arbitration Award Mandated By Office of Personnel Management (By Arbitrator Joseph Glasser).

5. In the matter of United States Department of Housing and Urban Development and Richard L. Frazier, Grievant, December 9, 1992, Federal Mediation and Conciliation Service, Arbitration No. 92-05883, Arbitration Award.

TABLE OF AUTHORITIES

Chrysler Motors v. International Union
959 F.2d 685 (7th. Cir. 1992)
cert. denied 113 S.Ct. 304 ..... 9, 11, 12

Communications Workers v. S.E. Elec. Co-op
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915 F.2d 840 (2nd. Cir. 1990) ..... 9, 11

Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters
969 F.2d 1436 (3rd. Cir. 1993)
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United Paperworkers International Union v. Misco
484 U.S. 29 (1987) ..... 10

W. R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers
461 U.S. 757 (1983) ..... 10

## BASIS FOR THIS COURT'S JURISDICTION

This court has jurisdiction under 28 U.S.C. section 1254 (1):

> Cases in the courts of appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) [omitted].

## TABLE OF LAWS IN ISSUE

1. 5 U.S.C. sec. 7703 (d)
2. 5 U.S.C. sec. 7513

## STATEMENT OF THE CASE AND DECISIONS

The issue presented by the appellant to the Court of Appeals and decided by that court was irrelevant to the arbitration submission and award. Therefore, this Court should reverse the judgment of the Court of Appeals and reinstate the arbitration award. As the confusion in the Court of Appeals stems from the unfocussed presentation of the case to the arbitrator and the inartful wording of the arbitrator's award, it will help to describe the case from the first proceeding.

The United States Department of Housing and Urban Development (hereinafter, "HUD") performed an investigation of a complaint by a fellow employee of Richard Frazier that he was sexually harassing her. Mr. Frazier was not a management employee, a fact which had considerable significance to the arbitrator. HUD concluded that Mr. Frazier had engaged in sexual harassment and "notoriously disgraceful conduct." Pursuant to the grievance procedures afforded him by the applicable collective bargaining agreement, he sought arbitration of whether HUD had just cause to suspend him. Thus, the forum and purpose of the case was one of labor relations between a disciplined employee and management.

At the arbitration, HUD presented evidence of Mr. Frazier's misconduct. Mr. Frazier, through counsel, attempted to impeach the credibility of HUD's witnesses, to minimize the significance of their complaints about him, and to demonstrate that HUD had failed to meet its own

regulations for the timeliness of handling complaints. One of the points which Mr. Frazier's defense stressed was that management had known of his conduct for many years and had not disciplined him previously.

The arbitrator's decision found that Mr. Frazier's conduct was notoriously disgraceful. He also found that the conduct was known to management and that management had done nothing to halt it. The arbitrator, therefore, concluded that Mr. Frazier did not know that his conduct was wrong. The arbitrator concluded that, since the grievant lacked knowledge that his conduct was wrong, he could therefore not have been "guilty" of sexual harassment. The decision and award, accordingly, stated, "The grievant is not guilty of sexual harassment so that the 60-day suspension was not for just cause."

This conclusion has been the focus of each attack on the decision. It is clearly not the correct legal analysis. Unfortunately, its inadequacy has obscured the subtle change made by the arbitrator upon the Petition for Reconsideration.

The Petition for Reconsideration argued that the arbitrator had misapplied the law governing sexual harassment in a workplace. The Office of Personnel Management (hereinafter, "OPM") asserted in its petition that the arbitrator had applied a criminal law standard rather than the applicable standard in 5 U.S.C. sec. 7513 of whether the employee's conduct impaired the efficiency of the service. The arbitrator's report on reconsideration

observed correctly that HUD had not presented any evidence at all on whether Mr. Frazier's conduct had impaired the efficiency of the Hartford office. Indeed, it had never even mentioned the concept. The report continued, most significantly, that the arbitrator must make his determination in the light of the record as a whole and the totality of the circumstances. The circumstances which the arbitrator found persuasive are stated in the last paragraph: "the agency by its own admission...has done nothing to "intervene promptly and effectively to put end [sic] to workplace sexual harassment." In short, the arbitrator's view, albeit embodied in a poorly drafted report rather than in the text of the award, is that the agency had no just cause to suspend an employee for misconduct that it had long tolerated. This issue is not addressed in any brief or petition of the OPM at any level.

OPM sought review in the Court of Appeals for the federal circuit. That court initially denied review. It based its denial on the ground that HUD acquiesced, at least tacitly, to the standards and burdens of proof used by the arbitrator, thus limiting the extent of the impact of the arbitrator's decision upon civil service law.

Upon OPM's Petition For Rehearing of the denial, the Court of Appeals decided to review the arbitration award. The order granting rehearing was based on the court's perception that the arbitration award appeared to contradict the standards enunciated in King v. Hillen, 21 F.3d 1572 (Fed. Cir. 1994) governing workplace sexual harassment.

Uitimately, the Court of Appeals held that the arbitrator had improperly analyzed sexual harassment from the point of view of the accused harasser, rather than from the point of view of the victim. It then took the arbitrator's findings regarding Mr. Frazier's conduct and made its own determination that Mr. Frazier had sexually harassed women in the HUD office. Lastly, the co rt presumed a nexus between Mr. Frazier's misconduct and the efficiency of the service, citing Cooper v. United States, 639 F.2d 727 (Ct. C Cl. 1980). Again, the Court of Appeals did not address the issue of whether the employer's prolonged tolerance of the misconduct rendered the suspension without just cause, or whether the arbitrator was empowered to take that circumstance into consideration in fashioning his remedy.

## ARGUMENT

This case is not about sexual harassment. Everyone has conceded that Mr. Frazier's conduct at work was disgraceful. This case is about the power of federal Court of Appeal to overturn an arbitrator's award without even considering the basis of the award. This case is about an appellate decision which correctly applies the wrong law; that is, it decided an issue that was immaterial to the arbitration award. This case is about an appellate decision which gives no thought to the applicable standards for review of the arbitrator's award, and does not even discuss the inconsistency of result among four different circuits which reviewed an arbitrator's award in a workplace sexual harassment matter. See Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters, 969 F.2d 1436 (3rd Cir. 1993), cert. denied 113 S.Ct. 660; Chrysler Motors v. International Union, 959 F.2d 685 (7th Cir. 1992), cert.denied 113 S.Ct. 304; Newsday v. Long Island Typographical Union, 915 F.2d 840 (2nd Cir. 1990); Communications Workers v. S.E. Elec. Co-Op, 882 F.2d 467 (10th Cir. 1989). At this stage of the proceedings the case is not about Mr. Frazier, but about the power of an arbitrator to consider the conduct of the employer in determining appropriate discipline of an employee's misconduct, and about the power of the Court of Appeals to review that consideration. This issue has not been determined below, and the case cannot be decided without it.

This court has had frequent opportunity to consider the general guidelines for reviewing arbitration awards. As a general matter, the power of the court to review

arbitration awards is extremely limited. United Paperworkers International Union v. Misco, 484 U.S. 29 (1987). Indeed, if the award is based essentially on the contract and the parties' submission, the court is bound to enforce it. W. R. Grace & Co. v. Local Union 759, International Union of United Rubber, 461 U.S. 757, 764 (1983). Ironically, in the case at bar, the issue submitted by the parties was whether the employer had just cause to suspend Mr. Frazier, not whether Mr. Frazier had sexually harassed women in the office, or even whether his harassment diminished the efficiency of the office.

The courts, nonetheless, make an independent review of claims that the arbitrator's award is contrary to public policy. W. R. Grace & Co., supra at 766. Although OPM has never expressly invoked this exception. It has never stated its issue on review as a claim that Arbitrator Glasser's award interferes with the government's enforcement of a public policy against sexual harassment in government offices. It would be a strange issue to raise, in light of the report on OPM's original request for reconsideration. That report expressed the arbitrator's provision that the way to have enforced the policy would have been for HUD to have taken note of Mr. Frazier's harassment and forbidden it clearly. Thus, far from contradicting public policy by letting a non-management employee get away with sexual harassment, the award was intended to promote the public policy by penalizing management for tolerating the employee's sexual harassment of other employees. The Court of Appeals, however, never considered that point.

The question is whether Arbitrator Glasser could have considered the misconduct of the employer in fashioning a remedy for the misconduct of the employee. The importance of this issue is especially apparent when one looks at the four circuit court opinions which have reviewed arbitrator's awards in cases of employee discipline for sexual harassment. In Stroehmann, the Court of Appeals reversed an arbitrator's reinstatement of an employee when the company had suspended him indefinitely pending an investigation. The court decided that public policy shifts the burden: an employer must be able to combat sexual harassment by suspending an employee until it is proven that the employee did not sexually harass another. In Newsday, the court reversed an arbitrator's reinstatement of a dismissed employee who had been warned on several previous occasions to desist his harassing behavior. In contrast, in Chrysler Motors, where the employee had never been previously warned or disciplined before being discharged, the court observed that "the arbitrator is free to bring his informed judgment to bear in order to reach a fair solution to a problem. This is especially true when it comes to formulating a remedy." 959 F.2d at 688 (Quoting from Misco, 461 U.S. at 41). Similarly, in Communications Workers, the court upheld an award by the arbitrator which reduced a discharge to a thirty-day suspension. The court there held that the totality of the circumstances permitted the arbitrator's award. The court concluded, "We cannot substitute our understanding of the workplace and judgment of Mr. Gray's conduct..." 882 F.2d at 467.

The Court of Appeals in the case at hand never considered the scope of the arbitrator's powers. It merely examined his analysis of sexual harassment and found it to be incorrect. The cases are myriad that a court is not to overturn an arbitration award for errors of law unless the arbitrator clearly disregarded the law. Here, Arbitrator Glasser observed that "the evidence is sufficient to show that the grievant did make many statements to [co-employees] which they found distressful" and that his conduct "could be perceived by most as no less than notoriously disgraceful." Thus, in fact, Arbitrator Glasser did make the findings required by a proper application of the law defining sexual harassment. Beyond that, however, the initial decision and later report on reconsideration is an inarticulate approach to the problem of discipline by an employer who has consistently tolerated the behavior which underlies the discipline. Applying the Chrysler Motors and Communications Workers analyses, the court should defer to the arbitrator's expertise in making that finding. The Court of Appeals, however, not only failed to defer to the arbitrator's expertise, it did not even recognize the issue upon which deference was due.

APPENDIX A

*United States Court of Appeals for the Federal Circuit*

94-3670

JAMES B. KING, Director, .
Office of Personnei Management,
Petitioner,

v.

RICHARD L. FRAZIER,
Respondent.

Judgment

ON APPEAL from the Arbitrator (Joseph Glasser)
in CASE NO(S). ARB 92-05883
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED

ENTERED BY ORDER OF THE COURT

DATED December 19, 1995 s/Francis X. Gindhart
Francis X. Gindhard,Clerk

ISSUED AS A MANDATE: February 9, 1995

A True copy

Attest 2/26/96

s/Sonia C. Huff
Deputy Clerk

Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-3670

JAMES B. KING, Director,
Office of Personnel Management,

Petitioner,

v.

RICHARD L. FRAZIER,

Respondent.

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DECIDED: December 19, 1995

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Before RICH, CLEVENGER, and RADER, Circuit Judges.
CLEVENGER, Circuit Judge.

James B. King, Director of the Office of Personnel Management (OPM), seeks review of the decision in Arbitration Docket No. 92-05883 (October 19, 1993). In that decision, the arbitrator overturned the 60-day

suspension imposed on Richard L. Frazier by the Department of Housing and Urban Development (the agency). We reverse.

I

On October 29, 1991, the agency suspended Mr. Frazier for committing sexual harassment and for engaging in notoriously disgraceful conduct. Upon receiving notice of his suspension, Mr. Frazier filed a grievance to challenge the suspension by arbitration, pursuant to the applicable collective bargaining agreement.

At the arbitration hearing, the agency presented the testimony of several women who had allegedly been the targets of explicit sexual explicit sexual comments made by Mr. Frazier in the workplace. Mr. Frazier did not deny making any of the offensive comments. The agency also submitted exhibits bearing Mr. Frazier's signature in which he acknowledged having received and read OPM's definition of sexual harassment and OPM's policy statement which prohibits sexual harassment in the workplace.

Based upon the evidence presented at the hearing, the arbitrator concluded that a preponderance of the evidence showed that Mr. Frazier engaged in "no less than notoriously disgraceful conduct." Furthermore, the arbitrator concluded that Mr. Frazier had likely conducted himself in the same manner for the preceding 25 years. As the arbitrator put it, "[ i ] t would seem that this is Mr. Frazier's lifestyles."

Despite these conclusions, the arbitrator stated that resolution of the case turned on whether Mr. Frazier knew or should have known that his conduct constituted sexual harassment. Based upon the evidence presented, the arbitrator decided that "Mr. Frazier did not know right from wrong," did not know that his conduct constituted sexual harassment, and was "not guilty" of sexual harassment. Therefore, the arbitrator reversed the agency's 60-day suspension.

The Director of OPM appeals the arbitrator's decision to this court. We have jurisdiction to review his petition pursuant to 5 U.S.C. 7703 (d) (1994).

II

OPM first contends that the arbitrator incorrectly interpreted and applied the legal standard for sexual harassment in the federal workplace. We agree.

OPM's policy statement defines sexual harassment as "deliberate or repeated unsolicited verbal comments, gestures, or physical contact of sexual nature which are unwelcome." This statement tracks the Equal Employment Opportunity Commission (EEOC) guidelines, which we have interpreted in the past. In King v. Hillen, 21 F. 3d 1572, 1579-80 (Fed. Cir. 1994), we synthesized recent Supreme Court precedent with the EEOC guidelines for sexual harassment. We stated that sexual harassment exists "if the offensive conduct is based on the employees' sex, is

unwelcome, and is sufficiently severe or pervasive to interfere with the employee's job performance or to create an abusive work environment." Id. at 1580.

This test requires both an objective and subjective inquiry. Id. at 1582; Harris v. Forklift Systems, Inc., 114 S. Ct. 367, 370 (1993). The objective inquiry requires the decision maker to determine whether a reasonable person would find the misconduct hostile or abusive. Id. The subjective inquiry requires the decisionmaker to determine whether the victim perceived the misconduct as creating a hostile or abusive environment. Id. Both inquiries, however, require that sexual harassment be judged from the perspective of the on being harassed. King, 21 F. 3d at 1582-83; cf. Ellison v. Brady, 924 F. 2d 872, 878 (9th Cir. 1991) ("[ I ] n evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim.")

Based upon this precedent, the arbitrator should have evaluated whether Mr. Frazier's conduct created a hostile or abusive environment from the perspective of the one being harassed. Instead, it is apparent that he viewed the situation from Mr. Frazier's perspective by introducing intent as an element of the offense. By so requiring, the arbitrator improperly borrowed the mens rea requirement from criminal law and interjected it into sexual harassment law.

Because the arbitrator never applied this legal standard, we reverse his decision on this charge. Remand is

unnecessary, however, because the evidence presented satisfies the legal standard. Objectively, the arbitrator found that Mr. Frazier made "statements to another which are patently notorious [ly] disgraceful and contrary to acceptable conduct by most of society." Subjectively, the arbitrator found that Mr. Frazier "made many statements of a sexual nature directly to the witnesses [the victims]. . . which they found distressful." Therefore, both the objective and subjective requirements of the sexual harassment test are met.

III

OPM also contends that the arbitrator erred by injecting an intent requirement into civil service law. On the facts of this case, and for the reasons explained below, we agree.

A governmental agency may discipline an employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513 (a) (1994). This requires a showing that: (1) the employee engaged in misconduct; and (2) there exists a nexus between the misconduct and the efficiency of the service. Brook v. Corrado, 999 F.2d 523, 526-27 (Fed. Cir 1993). Even if the case involves a collective bargaining agreement, the arbitrator may not apply legal standards which conflict with this standard. See Devine v. Levin, 739 F. 2d 1567, 1570 (Fed. Cir. 1984) ; Devine v. Brisco, 733 F. 2d 867, 871 (Fed. Cir. 1984))

As explained above, the arbitrator found that Mr. Frazier engaged in notoriously disgraceful conduct. After making this finding of fact, the arbitrator should have inquired whether Mr. Frazier's misconduct affected the efficiency of the service. Instead, the arbitrator cited Murray v. Dept. of Army, 40 M.S.P.R. 250 (1989), for the proposition that the employee must have an intent to commit the misconduct.

The arbitrator's reliance upon Murray is misplaced. In Murray, the agency charged the employee with two separate offenses: (1) making false accusations against co-workers; and (2) creating a disturbance in the workplace through rude remarks. Id. at 252. As to the first offense, the court required a showing of wrongful intent because an intent to deceive is a specific element of that offense. Id. at 255. As to the second offense, however, the court explicitly stated that 7513 (a) does not require that the misconduct result from wrongful intent. Id. at 255-56. Similarly, intent is not an element of the notoriously disgraceful charge levelled against Mr. Frazier.

Despite the arbitrator's failure to address the nexus requirement, we conclude that it is satisfied in the present case. Our precedent makes clear that the requisite nexus is presumed in cases where the employee's misconduct is so egregious that it speaks for itself. Brook, 999 F.2d at 527-28; Hayes v. Dept. of Navy, 727 F.2d 1535, 1539 (Fed Cir. 1984). This presumption is bolstered in cases where the agency can prove that the employee engaged in sexual harassment, as is the case here. Cf. Cooper v. United

States, 639. F.2d 727, 729-30 (Ct. Cl. 1980) ("We do not quarrel with the Government's finding that sexual misconduct adversely affects the employer-employee relationship."). Because Mr. Frazier has introduced no evidence to rebut this presumption, we reverse the arbitrator's decision on this charge.

IV

Having found that Mr. Frazier engaged in egregious misconduct, the arbitrator was required to follow established precedent in evaluating the legal ramifications thereof. Instead, he excused Mr. Frazier because Mr. Frazier supposedly could not discern right from worn. This approach was erroneous. Because the evidence amply supports the requirements of both charges, we reverse the arbitrator's decision and reinstate the agency's 60-day suspension.

## APPENDIX B

## FEDERAL MEDIATION AND CONCILIATION SERVICE

## ARBITRATION AWARD

| | | |
|---|---|---|
| Report and Decision | * | |
| In the matter of | * | |
| United states Department of | * | |
| Housing and | * | |
| Urban Development | * | |
| and | * | Arbitration #92-05883 |
| | | December 9, 1992 |
| Richard Frazier | * | |
| Grievant | * | |

Arbitrator: Joseph Glasser
15 Westwood Road
Storrs, CT 06268

## INFORMATIONAL DATA

The arbitrator was appointed by the Federal Mediation and Conciliation Service by letter dated April 29, 1992. The date for hearing was established by the parties as July 27, 1992 and July 28, 1992, and the location was the HUD offices in Hartford, Connecticut. The time of the hearing was set at 11:00 a.m.

The hearing was held on the appointed date at the place and time established above. Representing the Department of Housing and Urban Development regional office in Boston, MA was Mr. Robert Farrell, Attorney and representing the Grievant, Mr. Otto Witt, attorney.

The arbitration hearing on July 27th was from 11:00 a.m to 3:45 p.m. and on July 28th from 9:30 a.m. to 11:20 a.m.

The attorney for the Department of Housing and Urban Development indicated that he would provide a post-hearing brief. The grievant's attorney would not be submitting a post hearing brief but was informed by the arbitrator that he could submit a rebuttal brief if he chose to do so.

After receipt of the transcripts, the agency's post-hearing brief was submitted what was then followed by the rebuttal brief submitted by the grievant's attorney.

## Prefatory Statement

The arbitrator's statement to the attorneys indicated that all evidence that is to be introduced into the record must be done during the hearing. The reasons stated by the arbitrator for this requirement are that the arbitrator will know that both parties will be aware of what each has brought into evidence, and have the opportunity to question the accuracy and the relevancy of that evidence and to bring before the arbitrator countervailing evidence. The arbitrator informed the attorneys that any post-hearing briefs were for the purpose of clarifying matters raised during the hearing and/or providing any citations with full discussions of their relevancy to the evidence presented at the hearing.

The arbitrator brought to the attention of the attorneys that the purpose of an arbitration hearing is for the arbitrator to evaluate all evidence brought before him after an opportunity is provided to each party to fully state its position, present its evidence, and its witnesses, as well as rebut the opposition's position, question its evidence and cross-examine its witnesses (TR P 69-70-, 79-80). Only after the parties have completed this procedure, without restraint except when the arbitrator deems it necessary, can the arbitrator prepare an analysis of the information provided at hearing and supplemented by the party briefs, if they have chosen to submit them. This analysis is then the basis of the award and decision that the arbitrator files with the appointing agency and submits to the parties. It should also be stated that the arbitrator takes into consideration

aspects of evidence and testimony that have not been presented at the hearing but that are felt to significantly impinge upon the case.

## REPORT OF ARBITRATION

### Subject of Arbitration

The submission clause agreed to by the parties at the outset of the hearing is as follows:

a) Does the action of the agency, Department of Housing and Urban Development, violate Section 20.05 (5) of the collective bargaining agreement relating to suspension as to timeliness? Is the action timely under Section 20.01 (5) of the agreement?

b) Was suspension for just cause? If no, the there should be a recision of the discipline and the grievant be made whole for the pay and any benefits that accrued during the period November 17, 1991 to January 15, 1992.

### Facts of the Case

The facts of the case as presented in the section have been assembled from testimony presented at the hearing and relate only to those matters which impinge directly upon the issues on which the arbitrator is to rule.

Regarding the Issue-Timeliness

On May 3, 1991, the grievant, Richard Frazier, through his attorney, submitted a response to the proposed action of the agency to discipline him for "sexual harassment and notoriously disgraceful conduct." It was not until June 19, 1991 that the agency sent a letter indicating that it requires further investigation of the matter. The agency did not send further letters notifying Richard Frazier's attorney that it (HUD) was extending the time limit for issuance of the decision. HUD indicted that there was an apparent misunderstanding between the parties. HUD was attempting to give the grievant's attorney an opportunity to further defend the grievant and on July 11, 1991, sent newly-received affidavits for his review and comment. Since the grievant's attorney had moved, this material was returned and subsequently sent to the attorney's new address. The agency then waited for his comments. It was not until October 1, 1991 that the agency contacted the grievant's attorney and was informed that he had no comments about the affidavits. The agency issued its final decision on October 29, 1991.

Regarding the Issue-Conduct of the Grievant

The agency presented five witnesses that testified to the conduct of the grievant. All of these witnesses claimed they were subjected to verbal statements of sexual nature and/or heard Mr. Frazier make verbal statements of a sexual nature to others directly or about others indirectly (seeing women passing outside and making statements of a sexual

nature about them). On cross examination of some of these witnesses, there were some discrepancies between what they had testified to at an earlier date and their testimony at the hearing. One of the witnesses testimony went back to 1977. At least two of the witnesses testified that Mr. Frazier had made statements to them claiming he was the father of their sons.

Analysis of the Facts

Regarding the Issue of Timeliness

In order for the arbitrator to analyze the preceding facts as to timeliness, it is necessary to examine carefully the collective bargaining agreement between the agency, US. Department of Housing and Urban Development and the union, American Federation of Government Employees AFL-CIO. The relevant portion of this agreement is Section 20.05 (5). This states "A written decision .... shall be made within 35 days of the receipt of the employee's response ...". The mandatory aspect of the "shall" is negated by a later statement, "If management determines that further investigation is necessary, the time limit for issuance of the decision shall be extended". There is nothing in the clause which states when management must make this determination or when it must notify the employee of its decision (to extend the time limit), only that the employee shall be notified and shall continue to be notified at 30 day intervals thereafter. Based on the wording of this section, the June 19, 1991, letter sent by the agency fulfills its obligation under the agreement. HUD

may have erred by not sending 30 day letters of extensions, but the reason for extending the time period was to provide the grievant's attorney additional time to evaluate material it had not had earlier for the benefit of the grievant. In the arbitrator's opinion, an attempt to provide further due process which the agency could have reasonably assumed was notification to the employee (through his attorney), was a satisfactory substitute for a 30-day letter to the employee.

Regarding the Issue-Conduct of the Grievant

Despite the inconsistencies in the testimony of some of the witnesses, the evidence as presented by the agency is judged to meet the preponderance of evidence quantum of proof. Whether the grievant said what he said as often as it was thought by some of the witnesses, or whether the effect on the witnesses was as devastating to some of the witnesses as was claimed to have been the case, is not material. What is material, is that the evidence is sufficient to show that the grievant did make many statements of a sexual nature directly to the witnesses or indirectly relating to females passing outside in the presence of the witnesses, as well as other statements to some of the witnesses which they found distressful and which were heard by some of the other witnesses.

Arbitrator's Opinion

The first question to which the arbitrator must

respond is, Does the action taken by the agency violate Section 20.05 (5) and Section 20.01 (5) of the agreement as to timeliness?

In the analysis of the facts in a preceding section regarding the issue of timeliness, the arbitrator has ruled that the letter dated June 19, 1991, sent by the agency meets the timeliness requirement of the agreement and fulfills its obligation under the agreement.

The second question to which this arbitrator must respond is: Was the 60-day suspension of the grievant for just cause?

There is no doubt that the verbal statements by Mr. Richard Frazier to the witnesses could be perceived by most as no less than notoriously disgraceful conduct. How was the conduct perceived by Mr. Richard Frazier? The grievant has acted in this manner since 1977 as one witness testified. In all likelihood Mr. Frazier, who had twenty-five (25) years of Federal Service, has been conducting himself in 1991 as he did in all of the preceding 25 years of Federal Service, has been conducing himself in 1991 as he did in all of the preceding 25 years of employment. Mr. Richard Frazier even made sexual comments about women he saw walking past the agency's windows that were heard by the witnesses. It would seem that this is Mr. Frazier's lifestyle.

It is inconceivable that no agency supervisor personnel in all of 25 years of the grievant's employment, could have not heard any of his sexually explicit statements

about women walking by the office window. There was no evidence presented that any supervisory personnel ever brought to the grievant's attention that his conduct was unacceptable, and that his statements were considered to be sexual harassment. Supervisory personnel should have made clear that the continuation of this conduct by Mr. Frazier was against public policy and subject to disciplinary procedures.

There is evidence (Exhibit 5-9), although not presented by the agency, so that its full meaning cannot be determined and its import cannot be evaluated by the arbitrator because it was not open to examination by the grievant's attorney, that Mr. Frazier certified that he had "read the Summary of Standards of conduct distributed at this Meeting" (dated Nov. 4, 1981). It is presumed by the arbitrator that this may refer to exhibit 5-7 which refers to a "Policy Statement and Definition on Sexual Harassment" dated March 7, 1980. The arbitrator can only make the presumption because there was no reference to this exhibit during the arbitration hearing, but is the only evidence that is close to the date of Exh. 5-9

The question that enters the arbitrator's mind is: Even though the employee has signed his name that certifies he has read whatever that he was given, how much significance does he give Nov. 4, 1981 to a document dated March 7, 1980? It would seem that whoever passed out the document (which could easily have been one of ten of twenty other documents passed out at a meeting of employees) did not see this document, based on the date, as

having much importance if being disseminated at such a late date, so that he probably made no mention of it. It is further presumed that if the document had been given special attention as to its importance, this would have been given the full attention of the agency in its presentation to the arbitrator.

In the arbitrator's opinion, the passing out of a document at a meeting, even with a certification by the employees that whatever may have been passed out at a meeting was read, is not determined to be a satisfactory management presentation of such a serious topic.

There is no question in the arbitrator's mind that sexual harassment is whatever is perceived by the person who is subjected to the sexually explicit statements of another, especially when it is laced with "gutter expletives."

There is another aspect of the sexual harassment issue that should be examined. The question to be evaluated: At what point is a person who makes statements to another which are patently notorious disgraceful and contrary to acceptable conduct by most of society and has been determined to be "against public policy" by law, guilty of sexual harassment? An analogy that is appropriate to this question can be found in criminal law: The killing of one person by another is obviously contrary to public policy and there would be no question in anyone's mind that the act of killing would rank first. If it is proven in court (whatever that might mean), that a person who has killed someone, does not know right from wrong, that person is not found

guilty of murder, a crime against public policy. Therefore, any other conduct which by law, is against public policy, should be evaluated similarly. When the grievant's conduct was being evaluated by Mr. Harold G. Thompson in Exh 5, this concept was tangentially referred to by the statement "Mr. Frazier knew or should have known that the type of behavior exhibited by you would not be tolerated."

The significant question that the arbitrator raises: Did Mr. Frazier know or should have known that his conduct was sexual harassment? Why should Mr. Frazier know or should Mr. Frazier have known this? The only evidence presented by the agency that the grievant know or should have known was the signed statement that Mr. Frazier certified that he read some documents given to him. Even this evidence as presented without being given any attention by the agency's attorney during the hearing lacks great credibility as to what was to be read, and if even this had been proven, no other emphases is given to a document that is over one and a half years old. The importance ascribed to such a document by management approaches zero.

In the arbitrator's opinion, Mr. Frazier did not know right from wrong; that his conduct was contrary to public policy, let alone know that his sexually explicit statements directly made to a number of women exhibited notoriously disgraceful conduct or even that his several outbursts in the office, sexually describing women passing outside and his desires as they pertained to these woman, were unprofessional and lacked good taste.

The arbitrator is of the belief that Mr. Frazier's behavior had not undergone any change during the 25 years of service preceding the issuance of the 60-day suspension notice, that his conduct in the office had never been any different. There was no evidence presented that anyone, in management had ever brought to Mr. Frazier's attention that it is not acceptable conduct in the office to publicly express his sexual desires about women passers-by outside the building. Further, there was no evidence presented that agency management had ever brought to Mr. Frazier's attention, by requiring his attendance at a meeting, the significance of sexual harassment under the law, and the penalties that would be invoked for conduct by the agency personnel.

Arbitrators' Decision and Award

The grievant is not guilty of sexual harassment so that the 60-day suspension was not for just cause.

The record of this disciplinary action should be expunged from the personnel file of the grievant and the agency is to make the grievant whole for any pay and benefits lost during the 60-day period of suspension.

_____

Joseph Glasser

## APPENDIX C

## RECONSIDERATION OF ARBITRATION AWARD MANDATED BY OFFICE OF PERSONNEL MANAGEMENT UNDER 5 USC & 7703 (d) AND 7121 (f)

| | |
|---|---|
| In the Matter of: | * |
| | * |
| United States Department of | * |
| Housing and Urban Development | * |
| | * |
| and | * |
| | * |
| Richard Frazier | * |
| Grievant | * |

Federal Mediation and Conciliation Service

Arbitration #92-05883
December 9, 1992

Arbitrator:
Joseph Glasser
15 Westwood Road
Storrs, CT 06268

Date of Report:
October 19, 1993

## PREFATORY STATEMENT

The arbitrator has been petitioned to reconsider his arbitration award given in the Federal Mediation and Conciliation Service Arbitration #92-05883, by the Office of Personnel Management, under the authority granted it by 5 USC §7703 (d) and 7121 (f).

The Arbitrator's Decision and Award reads as follows:

> The grievant is not guilty of sexual harassment, so that the 60-day suspension was not for just cause.
>
> The record of this disciplinary action should be expunged from the personnel file of the grievant and the agency is to make the grievant whole for any pay and benefits lost during the 60-day period of suspension.

The Office of Personnel Management has submitted its brief in support of its petition for reconsideration. The attorney that represented the grievant during the arbitration hearing has submitted a reply brief in opposition to the Office of Personnel Management's Petition for Reconsideration.

5 USC §7703 (d) and §7121 (f) state in effect that if OPM determines that the arbitrator has erred in interpreting a civil service law, rule, or regulation effecting personnel management and that the arbitrator's decision will have a substantial impact on a civil service law, rule, regulation or policy direction, OPM can petition the arbitrator for a reconsideration of his decision.

## ARBITRATOR'S ANALYSES OF THE BRIEF IN SUPPORT OF THE OFFICE OF PERSONNEL MANAGEMENT'S PETITION FOR RECONSIDERATION

Under the heading "Background" the brief states "-- OPM has determined that the arbitrator's award in this case erroneously interpreted civil service laws, rules, or regulations affecting personnel management and that this erroneous award would have a substantial impact on civil service law". It would have been expected that this brief would have informed the arbitrator which civil service laws, rules, or regulations the arbitrator has erroneously interpreted. It did not do so.

Pages 2 to 9 of the OPM brief is under the heading "Facts." Much of this descriptive narrative relates to evidence presented by the Agency in its report of its investigation into this matter as well as evidence presented by witnesses who testified at the arbitration hearing.

The OPM brief then presented what it felt were statements made by the arbitrator. In so doing, it omitted significant words, so that in its paraphrasing of the arbitrator's statements, it has completely changed the meaning ascribed to the event by the arbitrator. For example the brief states, "The arbitrator did find evidence that the grievant certified that he read the summary of the agency's standard of conduct distributed on November 4, 1981. He (the grievant) had certified in writing that he had read the document." This is only partially correct. Much of what appears in the brief does not reflect what the arbitrator had written.

There is evidence (Exhibit 5-9) although not presented by the agency, so that its full meaning cannot be determined and its import could not be evaluated by the arbitrator because it was not open to examination by the

grievant's attorney, that Mr. Frazier (grievant) certified that he had "read the Summary of Standards" distributed at a meeting (dated) Nov. 4, 1981). It is presumed by the arbitrator that this may refer to Exhibit 5-7 which refers to a "Policy Statement and Definition of Sexual Harassment dated March 7, 1980. The arbitrator can only make a presumption because there was no reference to this exhibit during the arbitration hearing--".

The OPM sentence in the brief "The arbitrator did find evidence that the grievant certified that he had read the summary of the agency's standard of conduct distributed on November 4, 1981, is totally incorrect, because the arbitrator did not find evidence, he only presumed that a linkage could have been possible, but the agency made no attempt to prove the point at the hearing.

The first argument in the OPM brief is "The arbitrator erred in departing from the "Efficiency of the Service Standard set forth in 5 USC § 7513 and substituting in its place a standard of proof applicable to criminal proceedings. He further erred by requiring the agency to prove the appellant's wrongful intent."

It seems that the OPM is relying heavily for its argument on its misreading of what the arbitrator actually writes in his award. Earlier it was "The arbitrator did find evidence--" and in this section (P10) "--he (the arbitrator) concluded that, even though the grievant had signed a statement that re read, among other things, the agency's policy prohibiting sexual harassment the importance ascribed to such a document by management approaches zero." The arbitrator states "The only evidence presented by the agency----- was the signed statement that Mr. Frazier certified that he had read some documents given to him. Even this evidence as presented without being given any attention by the agency's attorney during the hearing lacks

great credibility as to what was read--". This differs greatly from the OPM's version of what the arbitrator had written.

The OPM brief makes the statement "The arbitrator's award is replete with analytical contradictions and it follows illogical pathways, but this is all besides the point. Even though the writer of the OPM brief indicates "but this is all beside the point," he dignifies the sentence with a footnote which is totally irrelevant to the argument made. "Some people do no act in a boorish and disgraceful manner only when they are unable to discern the difference between right and wrong, and may behave that way because they like it." This was preceded by an analogy with John Dillinger robbing banks as its central theme.

The OPM brief contains a footnote on P. 11 citing Vaughan v Dept of Navy, "The MSPB specifically held that where an agency charges an employee with sexual harassment under its own regulation, and the employee "had the regulation and had the opportunity to read it and govern his conduct accordingly --(h) is failure to do so does not excuse his misconduct." As has previously been written by the arbitrator, the agency (HUD) never presented its evidence at the arbitration hearing that, in fact the agency had issued the agency's policy on sexual harassment to the grievant.

The OPM brief in its argument stresses that the arbitrator erred in departing from the "Efficiency of the Service" standard when it is applied in the case of an employee's misconduct." The OPM brief cites from Cooper v United States," that an agency must make a determination that there is a nexus (a connection-added by OPM) between the employee's misconduct and the efficiency of the service. The agency (HUD), at no time, during the arbitration hearing, even referred to the concept of "that there is a nexus between the employee's misconduct and the

efficiency of the service," let alone even refer to the words "efficiency of the service."

The OPM, on P. 11 further states "The agency is not required to serve a list of proscribed conduct on employees and, if it chooses to do so, employees are not required to understand it as a prerequisite to their being disciplined." This cavalier statement which I presume is the position of the OPM and not just that of the attorney preparing the brief, because the signatures of the Assistant General Counsel and Deputy General Counsel have been offered to the brief, smacks of the doctrine of Sovereignty. this position was taken by government agencies whenever arbitrary and capricious acts were committed by agency management personnel in its relations with its employees. It should be brought to the attention of OPM, as they provide counsel for management for federal agencies, that the doctrine of sovereignty, that the government (represented by agency management), can do no wrong, has given way to the collective bargaining process. Further, that if an agency management, through its arbitrary and capricious or improper action, impugns the process of collective bargaining, the Supreme Court has "concluded that"--Penalizing the agency for disregarding procedural protections of the collective bargaining agreement is proper." This is from Cornelius v Nutt.

The OPM brief cites Murray v. Department of the Army 255 "that statutory provisions of 5 USC § 7513 (a) do not require that misconduct charges result from wrongful intent, but to the contrary, permits removal for such course as well promote the efficiency of the service." The agency in applying its discipline did not produce any evidence during the arbitration hearing how the discipline given the grievant would promote the "efficiency of the service."

Another citation from Murray v. Department of the Army (250,255) should be brought to the attention of the

OPM, "the MSPB held that "employee lacked requisite intent to commit falsification offense due to her mental illness." The arbitrator sees this ruling as applying directly to the matter of the arbitration. The MSPB upheld the judge's ruling in this cited case, that the person charged with committing the falsification offense did not realize (lacked the requisite intent) due to her mental illness. In the cited case, even though the person committed the alleged action (falsification of accusation) the person was not guilty of this action because she did not know that she was committing an unacceptable and punishable act. In the case heard at the arbitration, the arbitrator ruled that even though the grievant did in fact make statements that could be considered "notoriously disgraceful conduct," the arbitrator believed that he did not know his conduct was sexual harassment (similar to "lacked the requisite intent"). In the cited case, the judge did not sustain the charge that the appellant made false accusations was proper and this decision was upheld by the MSPB. In the arbitration case, the arbitrator did not sustain the charge that the grievant was guilty of sexual harassment was proper.

The OPM brief on P. 13 and 14, contains argument that is not the purview of the OPM. The material contained in this section is not argument relating to whether the arbitrator erred in his award. This material is what should have been presented by the agency in its defense of its disciplinary action at the arbitration hearing for the arbitrator's evaluation of the agency's position.

The second argument presented in the OPM brief is "Even if the agency had charged the grievant with sexual harassment under its own policy the arbitrator's own findings and conclusions require the sustaining of the agency's imposition of discipline in this case" or as stated in the "Issues" section P. 8, "requiring the sustaining of the agency's action." The arbitrator has provided both the issue and the argument because "sustaining the agency's

imposition of discipline" and "sustaining the agency's action" can be considered to be two different issues. For this reconsideration, it is the issue "sustaining the agency's action" which is to be given attention.

The OPM brief cites Nikovitz v Veterans Administration and the MSPB decision in this case. The facts in this case are significantly different from the case at issue in that it involved physical contact of a sexual nature toward a co-worker, therefore its findings cannot be considered relevant to this case.

The third argument of the OPM brief, "The evidence of the record and the arbitrator's own findings and conclusion would require sustaining the agency's imposition of discipline in this case". The phrase "the agency's imposition of discipline" is inferred to mean "the agency's imposition of a 60-day suspension". The Supreme Court in Meritor Savings Bank v V inson states "For sexual harassment to be actionable, it must be sufficiently severe or pervasive "to alter the conditions of (the victim's) employment and create an abusive working environment". The Court further stated that "the EEUC Guidelines" emphasize that the trier of fact must determine the existence of sexual harassment in light of "the record as a whole" and the "totality of circumstances".

The OPM brief is incorrect in its assessment of the arbitrator's report. A reading of the arbitrator's report will show that the arbitrator reflected on "the record as a whole" as trier of fact. From evidence presented at the hearing, the arbitrator had concluded that "There is no doubt that the verbal statements by Mr. Richard Frazier to the witnesses could be perceived by most as no less than notoriously degraceful conduct". The arbitrator also stated "Whether the grievant said what he said as often as it was thought by some of the witnesses or whether the effect on the witnesses was as devastating to some of the witnesses as

was claimed to have been the case, is not material". The arbitrator now must concede that he erred, he should have stated "is material" in the light of the preceding quotes from Meritor Savings Bank v Vinson. Further examination of the record, will show that the witness initiating the agency action (Myrta Hernandez) did not act in a timely manner in that the filing of her complaint against the grievant was not timely relative to the occurrence of the alleged misconduct of the grievant, but was filed shortly after the complainant admitted to having acted in an insubordinate manner toward the grievant who had given the complainant a legitimate order while in the capacity of an acting supervisor.

None of the agency's witnesses who testified against the grievant (Mr. Richard Frazier) claiming that he had made verbal statements that they felt were offensive, ever brought the matter to the attention of any supervisor. The reason for this was never raised during the arbitration hearing by either party. Why the witnesses never brought the actions of the grievant to the attention of their supervisors remained unanswered, but the conjecture of the arbitrator raised three possibilities: one, that the statements by the grievant to the witnesses (including the complainant) were not felt by them to be sufficiently abusive to take issue, the second, that the agency had not made employees aware that channels for complaint were available for them to make complaints, third, that even if the witnesses were aware of the channel through which complaints could be made, they may have felt that their supervisors would do nothing. Further, the agency, at no time during the arbitration hearing, brought forth evidence that it provided orientation sessions to make employees aware of public policy regarding sexual harassment and the disciplinary consequences of improper conduct by employees.

The arbitrator, has complied with the Supreme Court reiteration of the EEOC Guidelines "that the trier of fact must determine the existence of sexual harassment in

'the light of the record as a whole' and 'the totality of circumstance--'".

The OPM brief cites Intlefoker v Turnage, "Federal agencies are required to take steps to eliminate Title VII sexual harassment through appropriate disciplinary action." If the OPM attorney who prepared this brief had even looked at the first page of the Federal Reporter's synopsis of this case, he would have realized that the facts of the case have no relevancy to those of the case heard by the arbitrator. The ruling of the case Circuit Court in this case was to overrule a District Court finding, that a federal agency had met its obligation to take prompt and appropriate remedial action designed to end sexual harassment. The Circuit Court ruled that the action taken by the federal agency was inappropriate. The Circuit Court holding in Ellison v Brady "which established standard by which employees actions are measured when deciding whether employee is liable for sexual harassment by employee, applies retroactively as employers have long been on notice that they were required under Title VII to intervene promptly and effectively to put an end to workplace sexual harassment." The OPM's brief states "The arbitrator's award and its underlying premise prevent the agency in this case from carrying out its obligations to its employees under Title VII." How can the OPM make this claim when the agency by its own admission (through witnesses who claim they have been subjected to verbal abuse since 1977), has done nothing "to intervene promptly and effectively to put end to workplace sexual harassment." The agency could have done this many years ago by insuring that all of its employees fully understood what is sexual harassment and informing its women employees that anyworkplace sexual harassment should be promptly brought to the attention of management.

## CONCLUSION

The arbitrator has carefully considered and evaluated every point in the brief in support of the Office of Personnel Management's Petition for Reconsideration. The arbitrator finds that the conclusion drawn by OPM, "the award is incompatible with Federal civil service law, and should be reversed upon reconsideration" is incorrect. Further, the OPM request that the arbitrator "vacate his decision, reinstate the agency's action and dismiss the grievance" to be inappropriate.

Response to OPM request for reconsideration

Upon reconsideration of all issues brought before him, the arbitrator upholds his initial decision and award in the matter of United States Department of Housing and Urban Development and Richard Frazier, Grievant, Federal Mediation and Conciliation Service Arbitration #92-05883.

_____

Joseph Glasser

# APPENDEX D

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MISCELLANEOUS DOCKET NO. 389

JAMES B. KING, Director.
Office of Personnel Management,

Petitioner,

v.

RICHARD I. FRAZIER,

Respondent.

ORDER

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDRAL CIRCUIT

MISCELLANEOUS DOCKET NO. 389

JAMES B. KING, Director,
Office of Personnel Management,

Petitioner,

v.

RICHARD l. FRAZIER,

Respondent.

ON PETITION FOR REHEARING

Before ARCHER, Chief Judge, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

ORDER

The Office of Personnel Management (OPM) petitions for rehearing of the court's order denying its petition for review of an arbitrator's decision reversing the Department of Housing and Urban Development's (HUD) 60-day suspension of Richard L. Frazier. OPM also submits additional authority in support of its petition for rehearing,. Richard L. Frazier opposes.*

*The court also received two submissions from the arbitrator. However, because the arbitrator is not a party to these proceedings, the court will not consider these submissions.

This court has the duty to independently assess whether an exercise of our discretionary jurisdiction is warranted "because the decision will have a substantial impact on civil service law." Devine v. Sutermeister, 724 F.2d 1558 (Fed. Cir. 1983). In our initial order, this court denied OPM's petition for review because we were "not persuaded that the decision will have the requisite substantial impact" as required by 5 U.S.C. § 7703 (d). We stated in relevant part:

> Importantly, it appears that HUD, at least tacitly, agreed to the standards and burdens of proof that were presented in the arbitration proceeding.... Here, the decision of the arbitrator stemmed from the parties' formulation of the issues and presentation of their cases. OPM cannot argue that the decision will have a substantial impact when the agency agreed to the terms of the hearing.

OPM argues that rehearing should be granted based on three grounds: (1) the Civil Service Reform Act and this court's precedent "permit the OPM, because of its important role as the overseer of the Federal Personnel system, to assert errors in an arbitrator's decision even if those errors were not raised by the agency in the initial arbitration hearing;" (2) the arbitrator's conclusions "with respect to sexual harassment in the workplace do not comport with Supreme Court precedent, and, therefore, place civil service law at odds with Title VII of the Civil Rights Act of 1964;" and (3) because of this court's intervening case on sexual harassment, King v. Hillen, 21 F. 3d 1572 (Fed. Cir. 1994).

In response, Frazier argues that OPM's cited authorities are not on point because they pertain to the liability of an employer, not to the discipline of an offending employee. Frazier also reasserts his argument that the arbitrator's decision will have minimal impact upon civil service law.

With regard to OPM's first argument, the language of our earlier order suggested that OPM is estopped from arguing that the agency's conduct is formulating the issues and its agreement to the burdens of proof was error. OPM argues here that is not barred from taking a position contrary to that of the agency. We are not persuaded that OPM's argument is entirely on point. We note that the initial order focused on the agency's stipulation adopting the just cause standard and the agency's litigation choices, not on legal issues concerning sexual harassment. However, this court has recognized that OPM, on reconsideration and before this court, is not barred from raising an issue that an agency failed to raise. See Newman v. Corrado, 897 F.2d 1579, 1582 (Fed. Cir. 1990); Devine v. Levin, 739 F.2d 1567, 1570 (Fed. Cir. 1984). Regardless of the efficacy of this argument of OPM, we agree that rehearing is warranted because of the reasons discussed below.

We next consider OPM's arguments regarding the alleged inconsistency between the arbitrator's decision and Supreme Court precedent interpreting Title VII prohibitions against sexual harassment, and the impact of Hillen. After the issuance of the court's initial order, the court decided Hillen, a case setting forth the standards for analyzing whether sexual harassment occurred in the workplace. In Hillen, the court applied the Supreme Court's analysis in Harris v. Forklift Systems, Inc., 114 S.Ct. 367 (1993) which required "both an objective reasonableness standard in evaluating the conduct and its effect on the work environment and also considers the subjective perception of the victim."

The arbitrator's decision reversed the agency's 60-day suspension and determined that Frazier was "not guilty of sexual harassment." The arbitrator based his award, inter alia, on the following findings:

> There was no evidence presented that any supervisory personnel ever brought to the grievant's attention that his conduct was unacceptable, and that his statements were considered to be sexual harassment.
>
> In the arbitrator's opinion, Mr. Frazier did not know right from wrong; that his conduct was contrary to public policy, let alone that his sexually explicit statements directly made to a number of women exhibited notoriously disgraceful conduct or even that his several outbursts in the office, sexually describing women passing outside and his desires as they pertained to these women were unprofessional and lacked good taste.

The arbitrator determined that "the verbal statements made by Mr. Frazier to the witnesses could be perceived by most as no less than notoriously disgraceful conduct," and that "sexual harassment is whatever is perceived by the person who is subjected to the sexually explicit statements of another." Nevertheless, the arbitrator concluded that Frazier was "not guilty" of sexual harassment because of his alleged ignorance regarding the wrongfulness of his behavior and the lack of evidence indicating that management informed Frazier of the penalties that the agency could invoke as a result of his conduct. Given the court's recent elucidation of the standards governing sexual harassment in the workplace, the court should have the opportunity to consider the arbitrator's decision in light of the Hillen standards.

Because of the court's intervening case law and our consideration of the issues raised by OPM's petition for rehearing, we conclude the OPM's petition for review of the arbitrator's decision should be granted.

Accordingly,

IT IS ORDERED THAT:

OPM's petition for rehearing is granted. The court's initial order is vacated.

FOR THE COURT

Date

Randall R. Rader
Circuit Judge

cc: Ross D. Cooper, Esq.
Otto P. Witt, Esq.

s6

APPENDIX E

NOTE: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

*United States Court of Appeals for the Federal Circuit*

MISCELLANEOUS DOCKET NO. 389

JAMES B. KING, Director,
Office of Personnel Management,

Petitioner,

V.

RICHARD L. FRAZIER,

Respondent.

ON OPM PETITION FOR REVIEW

Before ARCHER, Circuit Judge, COWEN, Senior Circuit Judge, and RADER, Circuit Judge.

RADER, Circuit Judge.

## ORDER

The Director of the Office of Personnel Management (OPM) petitions for review of the December 9, 1992 decision, (reconsideration denied on October 19, 1993) of an arbitrator reversing the Department of Housing and Urban Development's (HUD) 60-day suspension of Richard L. Frazier. Frazier opposes.

On February 17, 1991, HUD proposed to suspend Frazier for 60 days for engaging in sexual harassment and notoriously disgraceful conduct. Frazier denied engaging in any such behavior. On October 29, 1991 HUD suspended Frazier, finding that the charges were supported by a preponderance of the evidence and that the suspension would promote the efficiency of the service.

Frazier filed a grievance and the matter was pursued to arbitration. The parties agreed that the issues subject to arbitration were a timeliness matter that is not at issue here and whether the "suspension was for just cause." The arbitrator determined that Frazier was "not guilty of sexual harassment so that the 60-day suspension was not for just cause" and ordered HUD to expunge the disciplinary action from Frazier's personnel file and give him backpay. The arbitrator found that the statements made by Frazier were of a sexual nature and could be perceived by most as no less than notoriously disgraceful." However, the arbitrator concluded that "Mr. Frazier did not know right from wrong; that his conduct was contrary to public policy, let alone that his sexually explicit statements directly made to a number of

women exhibited notoriously disgraceful conduct or even that his several outbursts in the office, sexually describing women passing outside and his desires as they pertained to these women, were unprofessional and lacked good taste." Finally, the arbitrator stated that "there was no evidence presented that agency management had ever brought to Mr. Frazier's attention, by requiring his attendance at a meeting, the significance of sexual harassment under the law, and the penalties that would be invoked for conduct by any agency personnel."

OPM requested reconsideration of the arbitrator's decision. As gleaned from the arbitrator's reconsideration decision, OPM argued that the arbitrator (1) erred in departing from the "efficiency of the service standard" and substituting a standard applicable to criminal proceedings, (2) erred in requiring HUD to prove wrongful intent, (3) erred in requiring the agency to prove it informed Frazier about conduct that constitutes sexual harassment, and (4) failed to look at the record as a whole. With regard to the arguments concerning the efficiency of the service and the need to prove intent, the arbitrator stated that HUD did not refer to the concept of efficiency of the service or even refer to the words. With regard to OPM's argument that the agency did not have to disseminate information about conduct, the arbitrator discussed the argument but failed to address the merits. Finally, the arbitrator conceded that he stated the law concerning totality of the circumstances incorrectly, but that he had nonetheless applied it correctly.

OPM now petitions this court for review arguing that the arbitrator erred in interpreting the law and that the decision will have a substantial impact on the administration of the civil service. 5 U.S.C. 7703 (d). This court must determine for itself whether an exercise of our discretionary jurisdiction is warranted because the decision will have a substantial impact on civil service law. Devine v. Sutermeister, 724 F.2d 1558, 1562 (Fed. Cir. 1983). OPM argues that the decision conflicts with the Civil Service Reform Act and "departs dramatically from long-standing precedent concerning the Government's burden of proof in personnel cases." OPM asserts that the arbitrator has infused an additional legal element into adverse personnel actions, not one required by the Reform Act.

Although we may agree that the arbitrator erred in his decision, we are persuaded that the decision will have the requisite substantial impact. Importantly, it appears that HUD, at least tacitly, agreed to the standards and burdens of proof that were presented in the arbitration proceeding. Thus, the circumstances are distinct from a case where the agency argued before the arbitrator or the Board that proper procedures, burdens, and precedents were not being followed. In that case, substantial impact argument would have more force. Here, the decision of the arbitrator stemmed from the parties' formulation of the issues and presentation of their cases. OPM cannot now argue that the decision will have a substantial impact when the agency agreed to the terms of the hearing.

Accordingly,

IT IS ORDERED THAT:

OPM'S PETITION FOR PERMISSION TO APPEAL IS DENIED.

FOR THE COURT

Feb 24, 1994
Date

s/Randall R. Rader
Randall R. Rader
Circuit Judge

cc: Ross D. Cooper, Esq.
Otto P. Witt, Esq.

A True Copy

Attest: 2/24/94

s/James Benjamin
Deputy Clerk

# APPENDEX F

## APPENDIX F

### 7703. Judicial review of decisions of the Merit Systems Protection Board

(d) The director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing a petition for judicial review in the United States Court of Appeals for the District of Columbia if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Supreme Court, U.S.
FILED
JUL 22 1996

No. 95-1886

# In the Supreme Court of the United States

OCTOBER TERM, 1995

RICHARD L. FRAZIER, PETITIONER

*v.*

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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FRANK W. HUNGER
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## QUESTION PRESENTED

Whether the Court of Appeals for the Federal Circuit may reverse an arbitrator's decision in order to uphold a federal agency's decision to suspend an employee for sexual harassment and notoriously disgraceful conduct.

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# In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1886

RICHARD L. FRAZIER, PETITIONER

*v.*

JAMES B. KING, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A8) is reported at 77 F.3d 1361. The order of the court of appeals granting rehearing (Pet. App. D1-D6) is unpublished, but the decision is noted at 43 F.3d 1485 (Table). The order of the court of appeals denying the petition for review (Pet. App. E1-E5) is unreported. The arbitration decision (Pet. App. B1-B12) and the reconsideration of the arbitration decision (Pet. App. C1-C11) are unreported.

### JURISDICTION

The judgment of the court of appeals was entered on December 19, 1995. Pet. App. A1. The petition for a writ of certiorari was filed on March 18, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Employment in the federal government is governed by the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. The Act sets forth "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988).

The Act provides that an agency may take adverse action against a federal employee (including removal, suspension for more than 14 days, reduction in grade or pay, or a furlough of 30 days or less) "for such cause as will promote the efficiency of the service." 5 U.S.C. 7512, 7513(a). An employee subjected to agency disciplinary action may appeal the agency's decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. 7513(d), 7701. For actions based on unacceptable performance or certain removals, the MSPB must sustain the agency's decision if it is supported by substantial evidence. The MSPB applies a preponderance-of-the-evidence standard in other cases. 5 U.S.C. 7701(c)(1).

The Act also requires that any collective bargaining agreement between a federal agency and a union provide for a grievance procedure and binding arbitration for the resolution of disputes arising under the agreement. 5 U.S.C. 7121(a) and (b). A bargaining unit employee may challenge a disciplinary action by appealing to the MSPB or by filing a grievance. 5 U.S.C. 7121(e)(1). If the employee files a grievance, and the union or the agency invokes binding arbitration (see 5 U.S.C. 7121(b)(1)(C)(iii)), the

arbitrator reviews the agency's decision under the same substantive standards used by the MSPB. 5 U.S.C. 7121(e)(2); see *Cornelius* v. *Nutt*, 472 U.S. 648, 652, 659 (1985).

Upon a determination adverse to the agency by either the MSPB or an arbitrator, the Director of the Office of Personnel Management (OPM) may seek review by the Federal Circuit of a final decision if the Director determines that (1) there was an error "in interpreting a civil service law, rule, or regulation affecting personnel management," and (2) the decision "will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d). Judicial review of arbitral decisions takes place "in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board." 5 U.S.C. 7121(f); see *Cornelius* v. *Nutt*, 472 U.S. at 661 n.16.[1]

2. In February, 1991, the Department of Housing and Urban Development (HUD or agency) proposed to suspend petitioner for 60 days for sexually harassing co-workers and for engaging in "notoriously disgraceful conduct." J.A. 23-35. After determining that the charges were supported by a preponderance of the evidence and that a suspension would promote the efficiency of the service, the agency on October 29, 1991, suspended petitioner for 60 days. Pet. App. A3; J.A. 53-55. Thereafter, petitioner filed a grievance to

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[1] Section 7703(c) sets forth the standard of judicial review to be applied by the Federal Circuit. The court must set aside agency action that is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence."

challenge the suspension under his union's collective bargaining agreement with the agency. Pet. App. A3.

In his decision, the arbitrator held that petitioner was "not guilty of sexual harassment so that the 60-day suspension was not for just cause." Pet. App. B12. The arbitrator concluded that there was sufficient evidence to show that petitioner had made repeated sexual comments to, and in the presence of, co-workers, and that petitioner had engaged in "no less than notoriously disgraceful conduct." *Id.* at B7-B8. Nevertheless, the arbitrator found the agency lacked just cause for the suspension because petitioner did not realize that his conduct constituted sexual harassment. *Id.* at B8, B11-B12. OPM petitioned the arbitrator to reconsider his decision pursuant to 5 U.S.C. 7703(d) and 7121(f). OPM argued, among other things, that the arbitrator erroneously departed from the "efficiency of the service" standard set forth in 5 U.S.C. 7513(a) by requiring HUD to prove that petitioner acted with wrongful intent and to prove that petitioner had been informed of what conduct constituted sexual harassment. Pet. App. E3. The arbitrator denied OPM's petition for reconsideration and sustained the original arbitration award. *Id.* at C1-C11.

3. The Director of OPM then filed a petition for review of the arbitrator's decision with the Court of Appeals for the Federal Circuit pursuant to 5 U.S.C. 7703(d), which was denied. Pet. App. E1-E5. The court of appeals determined that, although the arbitrator may have erred in rendering his decision, the case did not have the requisite substantial impact upon civil service law to warrant exercise of the court's discretionary review. *Id.* at E4.

OPM petitioned the court of appeals for a rehearing of the court's order denying OPM's petition for review. The court of appeals panel granted rehearing (Pet. App. D1-D6), and reversed the arbitrator's decision. *Id.* at A1-A8. Relying on this Court's decision in *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), and its own decision in *King* v. *Hillen*, 21 F.3d 1572 (Fed. Cir. 1994),[2] the court held that the arbitrator had applied the wrong legal standard for sexual harassment in the federal workplace by evaluating the situation from the perspective of the petitioner, rather than the perspective of the persons being harassed. Pet. App. A5-A6. The court found that remand was unwarranted on this issue because the evidence presented to the arbitrator met the requirements for establishing sexual harassment under *Harris* and *Hillen*. *Id.* at A6-A7.

The court of appeals also held that the arbitrator erroneously required the agency to prove an intent to harass. Pet. App. A6. Relying on its decision in *Brook* v. *Corrado*, 999 F.2d 523, 526-527 (Fed. Cir. 1993), the court made clear that, under the "efficiency of the service" standard, 5 U.S.C. 7513(a), an agency must show only that "(1) the employee engaged in misconduct; and (2) there exists a nexus between the misconduct and the efficiency of the service." Pet. App. A6. The court concluded that, although the arbitrator never addressed the "nexus" requirement, there was such a nexus in the present case. The court stated that, when "the employee's misconduct is so egregious that it speaks for itself," a nexus

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[2] The court of appeals had decided *Hillen* after its initial decision denying OPM's petition for review in the present case. Pet. App. D4.

between the misconduct and the efficiency of the service may be presumed. *Id.* at A7. Since the petitioner never rebutted this presumption, the court of appeals reversed the arbitrator's decision. *Id.* at A8.

## ARGUMENT

1. The court of appeals correctly reversed the arbitrator's decision because the arbitrator misinterpreted and misapplied the legal standard governing sexual harassment set forth by this Court in *Harris* v. *Forklift Systems, Inc.*, *supra*, and because the arbitrator erred in requiring HUD to prove that petitioner *intended* to harass his victims before HUD could discipline him.

a. It is undisputed that sexual harassment consists of sexual misconduct that would be perceived by a reasonable victim as creating a hostile or abusive working environment, when the victim in fact perceives the environment to be abusive. *Harris* v. *Forklift Systems, Inc.*, 114 S. Ct. at 369-370; see also *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 68 (1986). Departing from this standard, the arbitrator excused petitioner's "notoriously disgraceful conduct" because petitioner did not subjectively believe that his actions constituted sexual harassment. Pet. App. B10-B12.[3] The court of appeals correctly held that the arbitrator applied the wrong legal standard in determining whether petitioner had engaged in misconduct.

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[3] The arbitrator incorrectly asked, "How was the conduct perceived by [petitioner]?" and "Did [petitioner] know or should have known that his conduct was sexual harassment?" Pet. App. B8, B11.

b. The court of appeals also correctly found error in the arbitrator's insistence that the agency prove that petitioner had acted with wrongful intent. Pet. App. A6-A7. The CSRA provides that an agency may discipline an employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); Pet. App. A6. The agency is not required to prove that the employee's misconduct resulted from a wrongful intent. *Colon* v. *Department of the Navy*, 58 M.S.P.R. 190, 197 (1993) (disorderly conduct); *McMillan* v. *United States Postal Service*, 48 M.S.P.R. 590, 593 (1991) (assault); *Murray* v. *Department of Army*, 40 M.S.P.R. 250, 255-256 (1989) (disturbance in the workplace).

2. Despite petitioner's suggestions to the contrary (Pet. 11-12), an agency's prior tolerance of the employee's misconduct does not prevent the agency from taking adverse action to discipline such misconduct. Federal agencies are obliged to discipline employees for conduct that constitutes sexual harassment. *Intlekofer* v. *Turnage*, 973 F.2d 773, 779-780 (9th Cir. 1992). In this case, moreover, petitioner had signed a statement acknowledging that he had received and read OPM's definition of sexual harassment and OPM's policy statement prohibiting sexual harassment in the workplace. Pet. App. A3.

3. Petitioner does not question that the Federal Circuit properly reviewed the decision of the arbitrator under Section 7703(d) because of the decision's impact on civil service law. In this case, the arbitrator's decision conflicts with the CSRA, and departs dramatically from precedent concerning the government's burden of proof in personnel cases. Moreover, by requiring federal agencies to prove that employees perceived their misconduct to be prohibited

by agency policy, and that they intended to violate agency policy, the arbitrator's decision infused legal elements not required by the CSRA. If left uncorrected, the arbitrator's decision would significantly curtail the government's ability to discipline its employees for misconduct, a result clearly contrary to Congress's purpose in enacting the CSRA.

4. The Federal Circuit's decision in this case is not inconsistent with the four cases cited by petitioner that involve review of arbitrators' awards concerning sexual harassment in the private sector. Pet. App. 9, 11-12. In each of those cases, which did not involve federal employment, the court noted the deference due to arbitral awards, and reviewed whether the award violated public policy.[4] The cases

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[4] In *Stroehmann Bakeries* v. *Local 776, International Brotherhood of Teamsters*, 969 F.2d 1436, 1441-1442, cert. denied, 506 U.S. 1022 (1992), the Third Circuit reversed an arbitration award, and held that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur, violates * * * the well-defined and dominant public policy concerning sexual harassment in the workplace." Similarly, in *Newsday* v. *Long Island Typographical Union*, 915 F.2d 840, 843-845 (1990), cert. denied, 499 U.S. 922 (1991), the Second Circuit overturned an arbitration award that reinstated an employee who had engaged in sexual harassment. The court found that the return of a known sexual harasser to the workplace would perpetuate a hostile work environment and inhibit the employer from further preventing sexual harassment.

The other two decisions cited by petitioner deferred to an arbitrator (Pet. 11), but involved only a question of the severity of the penalty to be imposed. In *Communication Workers* v. *Southeastern Elec. Coop.*, 882 F.2d 467, 470 (1989), the Tenth Circuit refused to vacate an arbitrator's decision, reinstating an employee discharged for sexual harassment, because, among other things, the arbitrator imposed another type of discipline

followed this Court's decision in *United Paperworkers Int'l Union* v. *Misco, Inc.*, 484 U.S. 29, 37 (1987), which stated that the purpose underlying the Labor Management Relations Act, 29 U.S.C. 173, (that private disputes be settled without the intervention of government) dictated the finality of arbitral decisions unless they violate clear public policy. See also *W. R. Grace & Co.* v. *Rubber Workers*, 461 U.S. 757, 764-766 (1983). Relying on *Misco* and *W. R. Grace & Co.*, petitioner contends that, "if the award is based essentially on the contract and the parties' submission, the court is bound to enforce it." Pet. 10. This argument ignores the special purpose of the CSRA to ensure uniform application of the federal civil service laws, regardless of whether an arbitrator or the MSPB is reviewing agency action. 5 U.S.C. 7121(e)(2) and (f); see also *United States* v. *Fausto*, 484 U.S. at 451 (noting the importance of the Federal Circuit's role under Section 7703 to provide consistent interpretation of the civil service laws).

*Cornelius* v. *Nutt*, *supra*, lays to rest any question whether a reviewing court must defer to an arbitrator's decision that is legally erroneous under the CSRA. In *Cornelius*, this Court declined to defer to an arbitrator's interpretation of the "harmful error" rule in Section 7701(c)(2)(A) of the CSRA, an interpretation that had differed from that of the MSPB.

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on the employee. Similarly, in *Chrysler Motors* v. *International Union*, 959 F.2d 685, 689, cert. denied, 506 U.S. 908 (1992), the Seventh Circuit affirmed an arbitration award reinstating an employee who had been discharged for sexual harassment, holding that "a 30-day suspension rather than a discharge was an adequate sanction."

472 U.S. at 660-662.[5] Differing interpretations of the CSRA would have resulted in "the very inconsistency and forum shopping that Congress sought to avoid." *Id.* at 662. Similarly, the Court noted that Section 7121(f), which provides that arbitral decisions are subject to judicial review "in the same manner and under the same conditions as if the matter had been decided by the [Merit Systems Protection] Board," ensures uniformity between MSPB and arbitral decisions. 472 U.S. at 661 n.16.

The Federal Circuit has acknowledged in decisions under the CSRA traditional labor policy deference to arbitral awards. *Devine* v. *Levin*, 739 F.2d 1567, 1570 (Fed. Cir. 1983). The Federal Circuit, however, has not hesitated to exercise its discretion to review an arbitration award that, like the award in the instant case, conflicts with federal law. See, *e.g.*, *Horner* v. *Bell*, 825 F.2d 382, 383-385 (Fed. Cir. 1987) (arbitration decision misinterpreted collective bargaining agreement and violated management rights provision of CSRA); *Devine* v. *Levin*, 739 F.2d at 1569-1570 (arbitrator lacked jurisdiction over supervisor).[6]

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[5] Section 7701(c)(2)(A) requires an employee to show "harmful error in the application of the agency's procedures in arriving at [the agency's] decision." The Board had interpreted the rule to require a showing of prejudice to the individual employee, whereas the arbitrator had interpreted the rule to allow a showing of prejudice to the union because the agency had violated the collective bargaining agreement. This Court rejected the view that the agency should be penalized for violating provisions of the collective bargaining agreement when the procedural mistake had no effect on the agency's decision. 472 U.S. at 662.

[6] The proposition that some deference is due arbitral awards under the CSRA arose from *Devine* v. *White*, 697 F.2d 421 (1983), a case decided by the District of Columbia Circuit

The arbitration cases from the private sector cited by petitioner are therefore inapposite. None of them arose under the CSRA. As a result, none invoked the provisions of the CSRA that allow judicial review of arbitral decisions "in the same manner and under the same conditions" as if the court were reviewing a decision by the MSPB. 5 U.S.C. 7121(f). Under the CSRA, the court need not find that the arbitrator's award violated public policy in order to review the decision for compliance with the civil service law.[7] Here, the arbitrator applied the wrong legal standard for determining the existence of sexual harassment and also departed from the "efficiency of the service" standard under Section 7513. The Federal Circuit correctly reversed the arbitrator's decision.

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and in part overruled by this Court in *Cornelius* v. *Nutt*, 472 U.S. at 656 n.7. *White* held that, when considering OPM petitions for review, the court should balance the need for review against the "damage to arbitration inherent in the appellate process." 697 F.2d at 440. Even if a balance of factors were required in this case, the court of appeals correctly took jurisdiction over the arbitrator's decision in view of the erroneous legal standard used and the importance of the case to agencies attempting to end sexual harassment.

[7] Undermining an agency's ability to eradicate sexual harassment in the workplace would, in all events, clearly contravene public policy.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 95-1886

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**In the Supreme Court of the United States**

OCTOBER TERM, 1995

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Richard L. Frazier, Petitioner

v.

James B. King, Director
Office Of Personnel Management

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*On petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit*

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# REPLY BRIEF FOR THE PETITIONER

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5 pp

The Office of Personnel Management (hereinafter "OPM") continues to misstate the issue, and thereby confounds the need for this Court to review this arbitration proceeding. OPM asserts that the issue is whether the Court of Appeals for the Federal Circuit may overturn an arbitrator's award that applies the wrong legal standard to a determination of sexual harassment. Of course it may. Further, exactly as OPM asserts in its Brief, the Court of Appeals for the Federal Circuit exercises a unifying jurisprudence over federal issues of workplace conduct under the Civil Service Reform Act. That is not the issue. It is not the issue precisely because the arbitrator did find that the employee had sexually harassed the complainants. The issue before the arbitrator however, pursuant to the parties' submission, was whether the punishment was just. The issue before the court below therefore was whether an arbitrator who finds that an employee has misbehaved may nonetheless decide that his punishment was unjust when he also finds that management knew of the misconduct and condoned it. While the arbitrator's position in this regard was stated sloppily in his original award, his exposition of the matter upon OPM's Request For Reconsideration cannot leave any doubt of his intention. OPM's Brief In Opposition, nonetheless, makes no reference at all to the decision on reconsideration, and ignores the question submitted by the Petioner concerning the power of an arbitrator in such a case.

This central misdirection accounts for several subordinate problems in OPM's brief. Each of these will be addressed in a few sentences.

1. The Brief In Opposition urges repeatedly that this Court should continue to recognize the need for the Court of Appeals for the Federal Circuit to be free to unify federal employment law. Thus, the Brief In Opposition makes much of a supposed distinction between the cases cited by the Petitioner, all of which arose from private sector employment, and the need for a uniform federal law under the CSRA. If this distinction were valid, its consequence would be absurd. The issue is the power of an arbitrator to contravene a federal policy. The distinction asserted by OPM would grant an arbitrator greater power to contravene a federal policy when arbitrating private sector disputes than when arbitrating public sector disputes. This is obviously not the intent of any of the parties and contradicts *Devine v. Levin*, 739 F.2d 1567, 1569 (Fed. Cir. 1984), especially at footnote no.3.

2. The Brief In Opposition asserts that "an agency's prior tolerance of the employee's misconduct does not prevent the agency from taking adverse action to discipline such conduct." It offers no authority for this proposition. It does go on to cite *Intlekofer v. Turnage*, 973 F.2d 773 (9th Cir. 1992) for the proposition that federal agencies are obliged to discipline their employess for sexually harassing co-workers. That case, however, says nothing about the

first proposition; rather, to the contrary, it says that management must act swiftly to correct sexual harassment, and will be liable to an employee who is victimized by sexual harassment if it does not. If anything, *Intlekofer* supports an arbitrator's decision to hold management accountable for condoning sexual harassment by denying its right to punish an emplopyee whose behavior it condoned for years. The remarks of the arbitrator on reconsideration indeed make the very point. (See Petitioner's Brief, Appenix C-10.)

3. The only material which OPM offers in its Brief In Opposition to counter the Petitioner's development of the issue is at page 7 section 2: "in this case, moreover, petitioner had signed a statement acknowledging that he had received and read OPM's definition of sexual harassment and OPM's policy prohibiting sexual harassment in the workplace." To the contrary, the arbitrator found that the evidence on this point was contradictory and therefore was simply inconclusive. In short he did not make the finding which the OPM asserts in his brief. One point which is clear from *Intlekofer*, and legions of other cases, is that the court on appeal is bound by the facts found by the tribunal below so long as the record rationally supports those findings.

4. The OPM Brief In Opposition attempts further to distinguish *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) and *Chrysler Motors v. International Union*, 959 F.2d 685 (7th Cir.) cert. denied 506 U.S. 908 (1992), on the

ground that in those cases the arbitrator reduced an employee's punishment and in the present case the arbitrator eliminated the employee's discipline. This is an irrelevant matter of degree. Whether reduction or reversal, the two cases stand for the proposition that an arbitrator may consider management conduct in evaluating the justness of discipline.

In conclusion, the issue remains as stated by the Petitioner. OPM brief addresses a different issue. The case remains that one panel of the Court of Appeals upheld the arbitrator and another panel of the same court (not the court en banc) reversed the arbitrator on an issue that was not properly before it. The case remains further that the second panel on its own supplied a presumptive nexus between the employee's conduct and the efficiency of the service, when the issue was not addressed by the parties or the arbitrator during the arbitration, and when the Court of Appeals did not discuss or cite authority for the effect of the presumption but merely held abruptly that the employee had and failed to meet the burden of overcoming a presumption that nobody had even placed into issue. The case is not about sexual harassment. It is about the powers of the arbitrator and the Court of Appeals.